STATE OF MICHIGAN

COURT OF APPEALS

HOFFMAN-LAROCHE, INC., Plaintiff-Appellant,	UNPUBLISHED March 8, 2005
v	No. 252770 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee.	LC No. 01-018145-MT

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Plaintiff Hoffman-Laroche Inc., appeals as of right the trial court's order granting summary disposition for defendant Department of Treasury, holding plaintiff liable for payment of the Michigan Single Business Tax (SBT), MCL 208.1 *et seq*., for the period January 1, 1989, through December 31, 1993 (years at issue). We affirm.

During the years at issue, defendant issued two bulletins effectively stating that out-of-state businesses merely soliciting purchase orders within Michigan were exempt from the SBT. Plaintiff, an out-of-state corporation, had a number of sales representatives in Michigan that only solicited purchase orders, and consequently plaintiff did not file SBT returns. However, this Court, in *Gillette Co v Dept of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993), determined that out-of-state businesses could be subject to SBT liability if imposition of the tax was consistent with the Due Process and the Commerce clauses of the United States Constitution. *Id*. at 311-314. On February 24, 1998, defendant issued a new bulletin, essentially stating that it was retroactively determining SBT liability from January 1, 1989 on the basis of the *Gillette* decision. *Id*. Under the new bulletin, the activities of plaintiff's Michigan sales representatives subjected plaintiff to SBT liability for the years at issue. In 1996, defendant billed plaintiff for unpaid SBT liability, plus interest, due between the years at issue. Plaintiff paid under protest and filed this action for its return.

A. Standard of Review

> This Court reviews de novo a trial court's decision on a motion for summary disposition. Under MCR 2.116(C)(8), a motion for failure to state a claim for which relief can be granted tests the legal sufficiency of the pleadings. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. Summary disposition under MCR 2.116(C)(8)

> is proper when a claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. [*Allen v MGM Grand Detroit, LLC*, 260 Mich App 90, 93; 675 NW2d 907 (2003) (citations omitted).]

In addition, constitutional issue are subject to review de novo. *County of Wayne v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

B. Analysis

We initially observe that after the parties had filed their briefs on appeal in this matter, a panel of this Court decided *Rayovac Corp v Dep't of Treasury*, 264 Mich App 441; 691 NW2d 57 (2004), which addressed and expressly rejected each claim presented by plaintiff in the instant case. "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals . . . that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals . . . " MCR 7.215(J)(1).

Plaintiff first argues that defendant's retroactive application of a new expanded SBT statutory jurisdiction standard discriminates against or burdens interstate commerce. However the *Rayovac* Court expressly held that "[t]he retroactive application of the SBT for the tax years at issue does not discriminate against or unconstitutionally burden interstate commerce." *Rayovac, supra* at 448. Thus, plaintiff's claim does not merit relief.

Plaintiff second argues that defendant is bound to adhere to "its contemporary published guideline interpreting the statutory jurisdiction to tax standard when the Michigan administrative procedures act provides that such guidelines are binding on [defendant]." The *Rayovac* Court noted that;

> [p]laintiff also incorrectly argues that defendant was required by MCL 24.203(6) to follow its earlier statements of the law as set out in the revenue administrative bulletins. MCL 24.203(6) is part of the Administrative Procedures Act, which does not apply to revenue administrative bulletins. The revenue division act at MCL 205.3(f) authorizes the bulletins, and nothing in that act makes them binding on defendant in the face of contrary judicial decisions. [*Id*. at 448, n 1].

Thus, plaintiff's claim does not merit relief.

Plaintiff third argues that "[defendant's] attempt to retroactively tax a previously exempt class of taxpayers violate [plaintiff's] right to fair and just treatment." In regard to this issue, the *Rayovac* Court observed that "plaintiff has not vested right to continued application of a particular taxing standard, so it cannot complain that imposition of the SBT constitutes unfair and unjust treatment." *Rayovac, supra* at 449. Thus, plaintiff's claim does not merit relief.

Plaintiff fourth argues that "defendant is estopped, under either equitable estoppel or promissory estoppel, from using a SBT statutory jurisdiction to tax standard other than the standard [defendant] announced would be used when [plaintiff] and other taxpayers reasonably relied upon [defendant's] announced statutory nexus standard." However the *Rayovac* Court held that "defendant is not estopped from retroactively applying the new rule created by case law

simply because it had issued revenue administrative bulletins advising taxpayers of what the then-applicable rule was." *Rayovac, supra* at 448. Thus, plaintiff claims based on theories of estoppel do not merit relief.

Defendant last argues that, if its tax liability is upheld, its interest should be abated because it accrued due to excessive delays by defendant. We disagree.

An abatement of interest may be an appropriate remedy when interest accrues due to excessive delays which are not attributable to the taxpayer. See *Master Craft Engineering, Inc v Dep't of Treasury*, 141 Mich App 56, 74-75; 366 NW2d 235 (1985). However, where the taxpayer showed no prejudice, accrual of interest was proper. *Rayovac, supra* at 449; *Amway Corp v Dep't of Treasury*, 176 Mich App 285, 294-295; 438 NW2d 904, vacated in part on other grounds, 433 Mich 908 (1989). Here, there is no indication that plaintiff did not have use of the money during the delay. Moreover, we have previously found "no authority to support [the] petitioner's argument that it had a due process right to a speedy adjudication of [a] tax assessment." *Speaker-Hines & Thomas, Inc v Dep't of Treasury*, 207 Mich App 84, 91; 523 NW2d 826 (1994). Thus, plaintiff is not entitled to an abatement of interest.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh